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UNIVERSITY OF TORONTO
FACULTY OF LAW
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Canadian Constitutional Law

NCA CASES – Volume 1

Instructor: Professor Blaine Baker

2012-13

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Federation of Law Societies of Canada
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Syllabus

Canadian Constitutional Law

(Revised May 2011)

Candidates are advised that the syllabus may be updated from time-to-time without prior notice.

Candidates are responsible for obtaining the most current syllabus available.

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Canadian Constitutional Law

SCOPE OF THE COURSE

Constitutional law is distinguished by what it does (it creates the organs of the state and defines and limits their powers) and by its status (it is the supreme law with which all other laws and government actions must comply). The goal of this course is to provide candidates with an introduction to the various components of Canadian constitutional law, and to the basic principles necessary to understanding and applying the provisions of the constitution in legal practice.

The readings begin, in Part I of the course, with an introduction to the nature and sources of the Canadian constitution, followed by an overview of the procedures for amending the constitution, and an introduction to the federal nature of the state and the role of the judiciary in upholding the federal division of legislative powers.

In Part II, the readings explore the federal division of legislative power in sections 91-95 of the *Constitution Act, 1867* in more detail. The readings on federalism begin with an examination of the general principles of interpretation, and then turn to a study of a handful of the most important legislative powers, including the federal powers in relation to "peace, order and good government" [opening language of s.91], "trade and commerce" [s.91(2)], "criminal law" [s.91(27)], and the provincial power in relation to "property and civil rights" [s.92(13)].

In Part III of the course, the readings examine the rights and freedoms protected by the Canadian constitution, including the rights and freedoms guaranteed by the 1982 *Charter of Rights and Freedoms*. The readings in Part III begin with an examination of the language rights protected by the *Constitution Act, 1867*, the *Charter*, and the *Manitoba Act*. The next topic is the distinct constitutional position of Aboriginal peoples. The readings examine federal and provincial powers to pass laws in relation to Aboriginal peoples and lands, and the Aboriginal and treaty rights entrenched in s.35 of the *Constitution Act, 1982*. The readings then focus on four of the most important rights-conferring provisions of the *Charter* – freedom of conscience and religion [s.2(a)], freedom of expression [s.2(b)], life, liberty and security of the person [s.7] and equality rights [s.15] – as well as the provisions dealing with the application of the *Charter* [s.32], reasonable limits [s.1], the notwithstanding clause [s.33] and remedies [s.24, s.52].

EXAMINATION

The examination for this course will be a three-hour open book examination. The exam in the course may consist only of problem questions, or it may consist of a mix of problem questions, short answer questions and short essay questions.

A typical problem question will describe an actual or fictional statute (or other government action), and ask candidates to assess whether it is consistent with the provisions of the *Constitution Act, 1867* and/or the *Constitution Act, 1982*, and, if not, what the consequences are likely to be. Problem questions test candidates' ability to identify constitutional issues, accurately state the applicable legal rules, apply those rules to novel situations, and draw conclusions supported by analysis. In other words, problem questions require the exercise of independent judgment grounded in the application of general rules to specific fact situations. For candidates who lack experience writing such exam questions, familiarizing yourself with them through practice is essential. Candidates should practice by testing themselves, using the sample examination and perhaps by reviewing other samples of recent Canadian constitutional law examinations. Many Canadian law school libraries have copies of recent exams on file. In addition, some Canadian constitutional law professors have course websites with sample examinations and model answers.

Short answer questions, which may be in a true/false format, test candidates' ability to succinctly and correctly evaluate statements about the content of Canadian constitutional law, as in the following example:

> Question: Indicate whether the following statement is true or false, and cite the case listed on the syllabus that best supports your answer: Pursuant to the "general regulation of trade" branch of its power to enact laws in relation to trade and commerce in s.91(2) of the *Constitution Act, 1867*, Parliament may enact a comprehensive regulatory scheme aimed at promoting fair competition in intraprovincial and interprovincial trade.
>
> Answer: True. Relevant case listed on the syllabus: *General Motors v. City National Leasing*.

Short essay questions test whether candidates' have critically engaged with the material listed in the syllabus and have started to form their own opinions about the strengths and weaknesses of Canadian constitutional law (e.g.: "Would you favour the repeal of s.33 of the *Charter of Rights and Freedoms*?").

REQUIRED READINGS

The required readings under each topic consist of the applicable provisions of the text of the constitution, leading cases from the Supreme Court of Canada (and a few from other courts), and relevant chapters (or parts of chapters) from the leading English-language textbook on Canadian constitutional law: Peter Hogg, *Constitutional Law of Canada* Student Edition (Toronto: Carswell, published in a revised version annually) (this edition is referred to below as "Hogg").

The case law you are required to read is accessible in case reporters in law libraries – for example, Supreme Court of Canada rulings are reported in the Canadian Supreme Court Reports (S.C.R.). You may access the full text of all court rulings listed below at http://scc.lexum.org (for Supreme Court of Canada judgments), or at http://canlii.org (for other Canadian court rulings), or at http://www.bailii.org/uk/cases/UKPC/ (for Privy Council rulings). All of the court rulings listed in the required readings below are hyperlinked to the full text available online.

I recommend that candidates purchase a copy of the 2011 student edition of Professor Hogg's book. The student edition contains all of the chapters from the Hogg book included in the required readings below. Professor Hogg's book is also available in law libraries in a looseleaf format updated annually. Candidates are advised to use the most recent student edition of the Hogg book (or the looseleaf version) when completing the readings below, because it will contain the most up-to-date analysis of recent developments. Using a Hogg student edition from 2009 or 2010 is also acceptable, since the content of Canadian constitutional law, and thus of the Hogg textbook, does not change dramatically in a year or two. Using the Hogg student edition that is more than a few years old is not advisable, as you will be missing too many significant new developments in the case law.

Candidates should make regular reference to the texts of Canadian constitutional documents relevant to the topics covered in this course, especially the provisions of the *Constitution Acts* of 1867 and 1982 that are included on the list of required readings below. The key provisions are excerpted in Appendices I and III of the Hogg textbook. The full text of the *Constitution Acts* of 1867 and 1982 can also be found on the Department of Justice website at http://laws-lois.justice.gc.ca/eng/Const/index.html and on the website of the Canadian Legal Information Institute at http://www.canlii.org. For those who are interested in purchasing a separate volume containing a more comprehensive collection of constitutional documents (it is not necessary to do so), the best volume is B.W. Funston and E. Meehan, *Canadian Constitutional Documents Consolidated* 2d ed. (Carswell, 2007). The Department of Justice also publishes a handy volume entitled *A Consolidation of the Constitution Acts 1867 to 1982*, available for purchase online at http://www.fedpubs.com/subject/constitution/constitutions.htm.

Candidates should aim to develop an understanding of the basic principles of Canadian constitutional law that starts with the text of the Constitution Acts and is then deepened and extended by the principles developed through judicial interpretation of the text evident in the leading cases listed on the syllabus.

The Hogg textbook should serve to provide historical context and clear summaries of the law. Candidates are warned against focusing their study exclusively on the readings from the Hogg textbook. While the Hogg book is a marvellous source, it is important to give equal time to the study of the constitutional provisions and the leading judicial decisions listed on the syllabus. The listed cases are leading cases that set out authoritative statements of the content of Canadian constitutional law. The law cannot be derived from a study of the text of the constitution and the Hogg book alone.

In light of the sparse language of the constitutional text, the bulk of Canadian constitutional law is a product of judicial interpretation set out in the reasons in particular cases or references. Professor Hogg's book provides reliable summaries of the legal rules emanating from Supreme Court of Canada decisions; your understanding then needs to be extended by a careful reading of the leading cases on each topic. Candidates should be alert to instances where Professor Hogg's views are at odds with judicial opinions or are incomplete because he has not yet updated his book to reflect the latest judicial rulings listed on the syllabus. For example, the 2011 student edition of the Hogg textbook reflects developments up to October 2010; it does not include the most recent rulings listed in the required readings below (such as the Assisted Human Reproduction Act Reference, issued in December 2010).

The exam will test knowledge derived from all three sources – from the constitutional provisions themselves, from the case law, and from the Hogg book. An adequate understanding of and capacity to work with Canadian constitutional law requires a knowledge base that is a combination of the constitutional text, the case law and scholarly analysis.

TOPICS TO BE COVERED AND REQUIRED READINGS

The outline that follows gives the full requirements of the course. All of the required readings are examinable. As described above, the course is divided into three parts: basic concepts, distribution of powers and rights and freedoms.

The references to the chapters in the Hogg textbook below use the chapter numbers from the latest student edition.

COURSE CONTENT

I. BASIC CONCEPTS

1. Sources and Nature of the Constitution

Hogg, chapter 1, "Sources"

Reference re Secession of Quebec, [1998] 2 S.C.R. 217

2. Amending Procedures

Constitution Act, 1982, Part V, ss.38-49

Hogg, chapter 4, "Amendment", and chapter 5.7, "Secession"

Reference re Secession of Quebec, [1998] 2 S.C.R. 217

3. Federalism and Judicial Review

Constitution Act, 1867, ss.91-95

Constitution Act, 1982, s.52

Hogg, chapter 5, "Federalism"

II. DISTRIBUTION OF POWERS

4. Principles of Interpretation

Hogg, chapter 15, "Judicial Review on Federal Grounds"

Canadian Western Bank v. Alberta, [2007] 2 S.C.R. 3

Quebec (Attorney General) v. Canadian Owners and Pilots Association, [2010] 2 S.C.R. 536

5. Paramountcy

Hogg, chapter 16, "Paramountcy"

Rothmans, Benson & Hedges Inc. v. Saskatchewan, [2005] 1 S.C.R. 188

6. Property and Civil Rights

Constitution Act, 1867, s.92(13)

Hogg, chapter 21, "Property and Civil Rights"

Citizens' Insurance Co. v. Parsons, (1881) 7 A.C. 96 (P.C.)

Chatterjee v. Ontario (Attorney General), [2009] 1 S.C.R. 624

7. Trade and Commerce

Constitution Act, 1867, s.91(2), s.92(13), S.92A

Hogg, chapter 20, "Trade and Commerce"

General Motors of Canada Ltd. v. City National Leasing, [1989] 1 S.C.R.641

Reference re Securities Act (Canada), 2011 ABCA 77

8. Peace, Order and Good Government

Constitution Act, 1867, s.91 (opening words)

Hogg, chapter 17, "Peace, Order, and Good Government"

Reference re Anti-Inflation Act, [1976] 2 S.C.R. 373

R. v. Crown Zellerbach Canada Ltd., [1988] 1 S.C.R. 401

9. Criminal Law

Constitution Act, 1867, s.91(27), s.92(15)

Hogg, chapter 18, "Criminal Law"

Margarine Reference (Reference re Validity of Section 5 (a) Dairy Industry Act), [1949] S.C.R. 1

Reference re Assisted Human Reproduction Act, 2010 SCC 61

III. HUMAN RIGHTS AND FREEDOMS

10. Language Rights

Constitution Act, 1867, s.133

Manitoba Act, 1870, s.23 (quoted in Hogg, chapter 56, note 40)

Constitution Act, 1982, ss.16-23

Hogg, chapter 56, "Language"

11. Aboriginal and Treaty Rights

Constitution Act, 1867, s.91(24)

Constitution Act, 1982, s.25, s.35

Hogg, chapter 28, "Aboriginal Peoples"

R. v. Van der Peet, [1996] 2 S.C.R. 507, per Lamer C.J., paragraphs 1-94

Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010

Haida Nation v. British Columbia (Minister of Forests), [2004] 3 S.C.R. 511

12. Interpreting the Charter of Rights and Freedoms

Hogg, chapter 36, "Charter of Rights"

13. Application of the Charter of Rights and Freedoms

Constitution Act, 1982, s.32

Hogg, chapter 37, "Application of Charter"

Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624, paragraphs 19-52

Greater Vancouver Transportation Authority v. Canadian Federation of Students, [2009] 2 S.C.R. 295, paragraphs 13-24

Canada (Justice) v. Khadr, [2008] 2 S.C.R. 125, paragraphs 15-26

Canada (Prime Minister) v. Khadr, [2010] 1 S.C.R. 44, paragraphs 14-18

14. Override of Rights

Constitution Act, 1982, s.33

Hogg, chapter 39, "Override of Rights"

Ford v. Quebec (Attorney General), [1988] 2 S.C.R. 712, Part V of the Court's opinion, paragraphs 23-36

15. Limitation of Rights

Constitution Act, 1982, s.1

Hogg, chapter 38, "Limitation of Rights"

R. v. Oakes, [1986] 1 S.C.R. 103, per Dickson C.J., Part V of his opinion, paras. 62-79

Alberta v. Hutterian Brethren of Wilson Colony, [2009] 2 S.C.R. 567, per McLachlin C.J. at paragraphs 35-104, per Abella J. at paragraphs 133-176

16. Freedom of Conscience and Religion

Constitution Act, 1982, s.2(a)

Hogg, chapter 42, "Religion"

Syndicat Northcrest v. Amselem, [2004] 2 S.C.R. 551, per Iacobucci J., paragraphs 1-104

Reference re Same-Sex Marriage, [2004] 3 S.C.R. 698, paragraphs 47-60

Alberta v. Hutterian Brethren of Wilson Colony, [2009] 2 S.C.R. 567, per McLachlin C.J. at paragraphs 28-14, per Abella J. at paragraphs 125-132

17. Freedom of Expression

Constitution Act, 1982, s.2(b)

Hogg, chapter 43, "Expression"

Montréal (City) v. 2952-1366 Québec Inc., [2005] 3 S.C.R. 141

18. Life, Liberty and Security of the Person

Constitution Act, 1982, s.7

Hogg, chapter 47, "Fundamental Justice"

Charkaoui v. Canada (Citizenship and Immigration), [2007] 1 S.C.R. 350

Bedford v. Canada, 2010 ONSC 4264, Part X, paragraphs 279-439

19. Equality Rights

Constitution Act, 1982, s.15, s.28

Hogg, chapter 55, "Equality"

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143

R. v. Kapp, [2008] 2 S.C.R. 483

Withler v. Canada (Attorney General), 2011 SCC 12

20. Remedies

Constitution Act, 1982, s.24, s.52

Hogg, chapter 40, "Enforcement of Rights"

Vriend v. Alberta, [1998] 1 S.C.R. 493, per Iacobucci J., paragraphs 129-179

Khadr v. Canada, [2010] 1 S.C.R. 44, paragraphs 27-47

Vancouver (City) v. Ward, [2010] 2 S.C.R. 28

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Internet Sites for Provincial Legislation

This is a listing for all the provinces and is highly recommended	www.canlii.org
Ontario:	http://www.attorneygeneral.jus.gov.on.ca/english/legis/
British Columbia (Queen's Printer):	http://www.bclaws.ca/
Alberta (Queen's Printer):	http://www.qp.alberta.ca/

Supreme Court Judgments

http://scc.lexum.org/en/index.html